Jury option needs early verdict

UPPR r475 – application for order for trial by jury – no election for jury trial in pleadings – whether applicant must establish jury trial more appropriate – whether appropriate to order determination by jury

In *Rubin v Buchanan* [2011] QSC 275 Boddice J considered an application for a jury trial in circumstances where the parties had not elected trial by jury in the pleadings.

His Honour examined the conflicting approaches which have been taken on an application under r475 of the *Uniform Civil Procedure Rules 1999* (Qld) (UCPR) to change the mode of trial.

Facts

The plaintiff alleged that she had received written and oral advice from Storm Financial Services. She further alleged that she had met with the first defendant, a bank manager for the second defendant, to seek his professional advice about the wisdom of acting on that advice, and that in reliance on the first defendant's advice she invested moneys which were subsequently lost. The plaintiff claimed damages for breach of fiduciary duty, negligence and misleading and deceptive conduct.

None of the parties had elected a trial by jury in their initial pleadings, as permitted by r472 of the UCPR. The plaintiff applied under r475 of the UCPR for an order for a trial by jury. The defendants opposed the application.

Legislation

Rule 472 of the UCPR permits a plaintiff in a statement of claim or a defendant in a defence to elect a trial by jury, unless jury trial is excluded by an Act.

Rule 474 permits a court to order trial without a jury if the trial requires a prolonged examination of records, or involves any technical, scientific or other issue that cannot be conveniently considered and resolved by a jury.

Rule 475 of the UCPR permits the court to order a trial by jury. It provides:

> **475 Changing mode of trial**
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> (1) The court may order a trial by jury on an application made before the trial date is set by a party who was entitled to elect for a trial by jury but who did not so elect.
> (2) If it appears to the court that an issue of fact could more appropriately be tried by a jury, the court may order a trial by jury.

Submissions

It was submitted for the plaintiff that the plaintiff satisfied the requirements of r475(1) and that a trial by jury was appropriate because liability depended to a large extent on a disputed conversation between the plaintiff and the first defendant – a disputed matter regularly determined by juries in criminal trials. The plaintiff also submitted that there was no evidence that a trial by jury would cause any increase in costs or court time, or that the defendants would suffer any prejudice.

The defendants contended that in exercising the discretion under r475(1), the court must be persuaded that a jury trial is a more appropriate mode of trial than trial by judge alone. The defendants pointed to a range of factual matters as weighing against the exercise of the discretion to order a jury trial on the facts at hand.

Analysis

Boddice J considered the authorities that have interpreted r 475(1). His Honour first noted that in *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* [1999] QSC 384 Douglas J held that in order to succeed on an application under r 475(1), a party must persuade the court that a jury trial is a more appropriate mode of trial than trial by judge alone. In reaching this conclusion, Douglas J had adopted the dicta of Fullager J in *McDermott v Collien* (1953) 87 CLR 154 at 157.

A different interpretation of r475(1) was adopted by Byrne J in *Neilsen v State of Queensland* [2001] Qd R 500. Byrne J rejected the contention that r475(2) prescribed a condition necessary to the exercise of the power under r475(1), and concluded that the power under r475(2) was separate, allowing a judge to order trial by jury on the court's own volition. Byrne J regarded it as sufficient on an application under r475(1) to establish that the jury "could appropriately deal with the matter".

In the subsequent decisions of Mullins J in *McLennan v Yared* (unreported, QSC, 17 October 2001) and of White J in *Borland v Makavskas* (unreported, QSC, 17 May 2000), both Mullins J and White J preferred, and followed, the interpretation adopted by Byrne J.

Boddice J noted that authorities construing the corresponding rules in the former *Rules of the Supreme Court* (Order 39 rr5, 10) supported a contention that the discretion to order a change of mode of trial to trial by a judge with a jury required an applicant to establish the action could more conveniently be tried with a jury. However, his Honour was satisfied that the former rules were materially different to r475 of the UCPR. In particular, the former rules expressly provided that if no election for trial by jury had previously been made, the trial should be by judge alone, whereas r475 did not contain this prescription. Boddice J concluded (at [20]):

"[20] A reading of r475, in context with rules 472 and 474, favours the interpretation adopted by Byrne J in *Neilson*. That interpretation accords with the plain ordinary reading of r475. I respectfully decline to follow *Labrador Holdings*. Its interpretation was reliant upon *McDermott*, which concerned materially different rules."

Accordingly, the plaintiff's application was to be determined on the basis that the court had a discretion to order trial by jury, if satisfied the proceeding could appropriately be tried by a jury. The discretion was to be exercised having regard to all the circumstances of the case.

In considering the circumstances of the proceeding before him, Boddice J referred to the following:

- the length and complexity of the pleadings
- the necessity to resolve disputed factual issues based on findings of credit
- the necessity to consider various different factual scenarios when determining issues of reliance and causation
- that the jury would need to give its verdict though answers to specific questions, which were likely to be numerous

- that lengthy oral addresses would be required before the jury retired to consider its verdict
- that a jury trial would be likely to significantly lengthen the trial and consequently the costs to the parties
- that the proceeding had been litigated for almost two years with neither party wanting trial by jury
- that the issues in the claim did not call for a jury trial.

His Honour was satisfied that these factors rendered the proceeding one that was not appropriately tried by a jury.

The application was dismissed.

Comment

It will clearly be easier to establish that a proceeding could appropriately be tried by a jury than to meet the test laid down by earlier authority of establishing that a jury trial is more appropriate. As this case demonstrates, however, the test will not be easily satisfied in modern commercial litigation. Parties' representatives should consider the benefits or otherwise of a trial by jury at the outset, and make any request for a jury trial in the pleadings.